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IN THE

Supreme Court of the United States

October Term, 1976

NO 75-1204

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SEYMON B. HARRISON
and
NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY,
Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Seymon B. Harrison, hereby files its brief in opposition to the petition of the United Transportation Union.

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the decision of the United States District Court awarding the respondent compensatory damages and properly reversed the decision of the United States District Court denying respondent attorney's fees.

STATEMENT OF THE CASE

Respondent agrees with petitioner's Statement of the Material Proceedings. Respondent adopts as its Statement of the Facts those set forth in the written opinion of the Fourth Circuit Court of Appeals (petitioner's Appendix, 5A-8A), adding only the following.

As a result of the union's failure to advise Harrison that his grievance was not going to be "progressed" by the union, Harrison lost his right under the union constitution to appeal within the Union.

Respondent has included in this brief, as a one page Appendix, the memorandum of the railroad's President, F. S. Morrison dated April 20, 1971.

ARGUMENT

1. THE DECISION BELOW WITH REGARD TO THE AWARD OF COMPENSATORY DAMAGES DOES NOT CONFLICT WITH THE PRIOR DECISION OF THE COURT BUT IS CONSISTENT THEREWITH

The Court below held that the union, having intentionally denied respondent his remedy to contest a wrongful suspension, must compensate him for earnings lost during the suspension.

The petition argues that the decision below misconstrues this Court's rulings in Vaca v. Sipes, 386 U.S. 171 (1967), and Czosek v. O'Mara, 397 U.S. 25 (1970). Its argument fails to recognize the particular circumstances of the instant case; factors that establish Vaca and Czosek as cases strongly supportive of the decision below.

The court below placed the grievance in proper perspective stating that, ". . . proof of a grievance's merits is circumstantial evidence that the failure to process the claim constituted bad faith" (Appendix 10A). The jury found that the union intentionally misled Harrison as to his rights under the collective bargaining agreement. By its concealment the union also denied Harrison as to his right under the union

constitution. Two contractual obligations were intentionally ignored.

Harrison's claim that the railroad was implicated in the union's breach of the duty of fair representation after the suspension was rejected by the lower court. This case concerns solely the union's breach of its duty in preventing a determination as to whether the railroad's conduct was wrongful and in denying Harrison's right under the Union Constitution.

In neither Vaca nor Czosek were the union members misled as to their access to the grievance procedures. The plaintiffs in both cases knew what action their unions had taken. Further it was assumed in each that the employer's conduct was a breach of the collective bargaining agreement and that liability could be established in that quarter.

The question posed in Vaca, cited in petitioner's brief at page 8, was, "May an award against a Union include, as it did here, damages attributable solely to the employer's breach of contract?" In Czosek the court stated:

> "Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the Union and a subsequent discriminatory refusal by the Union to process grievances based on the discharge, damages against the Union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the

difficulty and expense of the employer." See Czosek v. O'Mara, supra 29. (Emphasis added).

If, in the present case, the employer were ultimately proven free of wrongful conduct, would the union's conduct in intentionally denying Harrison access to the grievance process be less reprehensible?

The Court's decision in Vaca applied to the facts of this case stands for the principle that a union member may not be denied fair representation and that in cases where it is denied the federal courts must fashion remedies appropriate to the circumstances presented. Czosek, also supports the right to fair representation but adds, that in appropriate cases, the union member litigants should be awarded their costs incurred in vindicating the right including attorney's fees; a question discussed below.

Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974) is described by the Court below as "inconsistent" with the decision in Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972). Schum is an exhaustion of remedies case in the tradition of Glover v. St. Louis - San Francisco R. Co., 393 U.S. 324 (1969) which holds that the union member has direct access to the courts where the union breachs its duty of fair representation.

The Schum decision however is not properly applied to the instant case where a union member has been deliberately mis-

led as to his rights. Assume again that Harrison had sought a recovery against the railroad and the court had found his suspension proper. Would no recovery lie against the union which denied access to established channels? To so rule would lend the Court's approval to the future improper concealment of union decisions.

In Vaca v. Sipes, supra, this Court stated that the gravemen of a breach of the duty of representation case is not the relative merits of the grievance but the manner in which it is handled. The very basis for denying an employee absolute control over his grievance is his absolute right to fair representation. This right should not be dependant on proof that the employer's activities were improper.

The union's obligation being absolute should not its intentional abandonment be at the union's cost? The union deprived Harrison of its expertise as well as the relatively smooth, established grievance procedures of the collective bargaining agreement. That being established, must he now prove not only the breach of the union's absolute duty to fairly represent him but also the merit of the grievance in order to be made whole?

To insist on such a procedure is to place an incredible burden on the employee. Fellow workers, reluctant witnesses, at best, have to be called to testify against their employer. The litigation is protracted, expensive and, in most cases, involves relatively small sums of money. (It is easily understood why most report-

ed breach of representation cases concern discharges.)

Respondent submits that if Vaca is read as requiring proof of the employer's breach in order for an employee to recover his lost wages it is contradictory. So also is Czosek; "The claim against the union defendants for their breach of their duty of fair representation is a discrete claim quite apart from the right of individual employee expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board." Id at 28.

Where a union intentionally conceals, and thus deprives, a member of his absolute rights it should compensate him for the value of the right lost; in this case the loss of wages during suspension.

The Fourth Circuit has expressly upheld jury awards of compensatory damages assessed solely against a union because it breached its duty of representation. Griffin v. International Union, United Automobile A. & A.I.W., 496 F.2d 181 (4th Cir. 1972); Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966).

The Railway Labor Act establishes the union's duty to properly represent its members and to that extent it is federal legislation designed to protect the civil rights of a particular class. The Fourth Circuit has carried its clear meaning beyond the limitation of racial discrimination. Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191

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(4th Cir. 19630; Hostetler v. Brotherhood of Railroad Trainmen, 287 F.2d 457 (4th Cir. 1961).

In Sullivan v. Little Hunting Park, 396 U.S. 229,239, 24 L.Ed.2d 386, 393-394 (1969), the Supreme Court spoke to the question of damages where federally created rights are impaired quoting the case of Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939 (1946) as follows:

> "(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal court may use any available remedy to make good the wrong done." (Id., at 684, 90 L.Ed. 944).

The Court further stated: "Compensatory damages for deprivation of a federal right are governed by a federal standards, as provided by Congress in 42 USC §1988, . . ."

In Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966), the Court found that the District Court did not abuse its discretion in refusing to set aside the jury verdict as to damages. Referring to Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 1 L.Ed. 972

(1956), the Court stated:

> Lincoln Mill mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. Since neither plaintiff nor the defendant saw fit to make the railroad a party to this action, the only effective remedy is a damage award for the for the loss of past and future earnings. (Emphasis added).

An award of compensatory and punitive damages was the only effective remedy in this case and was proper under the particular curcumstances presented.

2. AN AWARD OF ATTORNEY'S FEES UNDER THE "COMMON BENEFIT" THEORY IS PROPER IN A SUIT ALLEGING A BREACH OF THE DUTY OF FAIR REPRESENTATION.

The general rule that attorney's fees are not allowed where there is no statutory or contractual authority therefore is subject to several exceptions. These include cases where an award will benefit a large identifiable class of people. Brewer v. School Board of Norfolk, 456 F.2d 943, 948-949 (4th Cir. 1972). The actual recovery of a fund is not a prerequisite to the award of attorney's fees to a successful litigant.

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1960).

The Court of Appeals in the present case based its decision as to attorney's fees on the common benefit theory. (Appendix 16A-17A). As in the case of Hall v. Cole, 412 U.S. 1 (1973), Harrison's action vindicates a right common to all members of his union.

In United States Steelworkers of America v. Butler Manufacturing Co., 439 F.2d 1110, 1112-1113 (8th Cir. 1971), a suit under §301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A §185(a), the court said that award of attorney's fees, "constitutes an appropriate item of damage to be awarded by courts in the enforcement of national labor policy." The Court in Butler characterized such damages as compensatory rather than punitive.

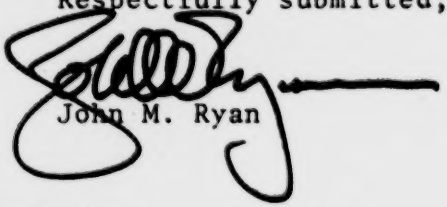
Attorney's fees have been expressly allowed in cases involving a breach of the duty of fair representation. Rolax v. Atlantic Coast Line R. Co., 186 F.2d 483 (4th Cir. 1951); Tedford v. Peabody Coal Co., 383 F.Supp. 787 (N.D.Ala. 1974). And they clearly fall within that category of damages described in Vaca v. Sipes, 386 U.S. 171, (1967), as representing the added expense, "caused by the union's refusal to process the grievance." Id. at 197-198.

Regardless of whether the jury's award of damages for wages lost during suspension is upheld the award of attorney's fees as compensatory damages clearly supports the assessment of punitive damages.

CONCLUSION

Respondent submits that the decision of the Fourth United States Court of Appeals herein was consistent with existing Federal law and that the award of attorney's fees was proper. Respondent urges the Court to deny the Petition for Certiorari filed herein.

Respectfully submitted,



John M. Ryan

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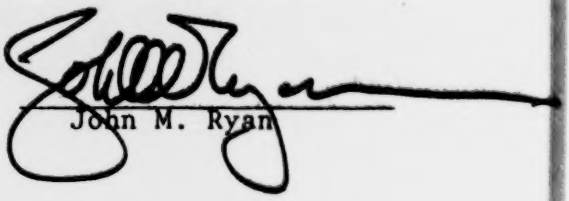
CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Brief in Opposition to Petition for a Writ of Certiorari in the case of United Transportation Union v. Seymon B. Harrison and Norfolk and Portsmouth Belt Line Railroad Company were mailed to Raymond H. Strople, Esquire, Moody, McMurran and Miller, Ltd., Post Office Box 1138, Portsmouth, Virginia 23705, counsel of record for Petitioner and delivered to William E. Rachels, Jr., Esquire, 1800 Virginia National Bank Building, One Commercial Place, Norfolk, Virginia 23510, counsel

of record for the Norfolk and Portsmouth Belt Line Railroad Company, on the 8th day of April, 1976. It is further stated that the petition has been served on all parties.



John M. Ryan

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
220 LAW BUILDING
NORFOLK, VIRGINIA 23510

F. F. MORRISON
PRESIDENT AND GENERAL MANAGER

April 20, 1971

MEMORAKDUM FOR FILE:

Conference was held in my office commencing at 10:00 A.M., on Tuesday, April 20, 1971, with the following in attendance:

C. C. Harrel, Jr., Vice General Chairman, United Transportation Union (T)
E. G. Reitz, Local Chairman, United Transportation Union (T)-Local 854
Mr. M. E. Huddle, Superintendent, N&PBL Railroad Company
F. F. Morrison, President and General Manager, N&PBL Railroad Company

The primary purpose of this conference was to meet and become acquainted with Mr. Harrell who has generally been assigned by the UTU to handle matters pertaining to UTU represented employees in yard service. However, the following claims or grievances were discussed in some detail and disposed of as follows:

Conductor Howard J. Gray, Jr., will be reinstated to service with seniority and vacation rights unimpaired but without pay for lost time provided the UTU does not further progress thei claims in favor of S. B. Harrison, (UTU file 7389-854-letter dated 2-11-1971), J. B. Harrison, (UTU File 7388-854, letter February 12, 1971). It was agreed by those in attendance that they would not be progressed until too late to do so account time limit.

Mr. Harrell and the undersigned also discussed the status of Brakeman J. J. Wood who is presently being held out of service due to physical disqualification by our company physician Dr. Alex T. Mayo. Mr. Harrell advised that Mr. Wood no longer wishes to be represented by the UTU in the handling of this matter and any further handling would be the responsibility of Mr. Wood.

Conference was adjourned at approximately 10:45 A. M.

F. F. Morrison
President and General Manager

FSM:hcp

cc: Personal file: S. B. Harrison
J. B. Harrison
J. J. Wood

P/T* 10